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No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, *Petitioners.*

v.

PAUL R. HEITMEYER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

CLARENCE C. DILL,
JAMES W. GUM,
Counsel for Paul R. Heitmeyer.

January, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION OF COURT BELOW.

The United States Court of Appeals for the District of Columbia rendered its opinion April 3, 1939 (R. 52), which is reported in 105 F. (2) 41.

The Commission failed to carry out the opinion and order of the Court within the 30 day period prescribed by the Court, whereupon Paul R. Heitmeyer, the respondent

herein, petitioned the Court for a writ of mandamus (R. 66.) The appellant filed its Opposition to said petition on May 8, 1939 (R. 68), and on May 24, 1939 the Court filed its Per Curiam Order granting the writ of mandamus (R. 70.)

Following refusal of the Court below to vacate said order, Federal Communications Commission petitioned for a writ of certiorari on August 24, 1939, which was granted October 16, 1939.

QUESTION PRESENTED.

While the technical question presented is whether or not the Court below erred in issuing the order for the writ of mandamus, the substance of the issue goes to the main question of the right of the Commission to reopen the hearings in this case and bring in two new parties, hitherto strangers and unknown to the record, for a comparative hearing of their application with the application of respondent, their applications having been filed after the record in this case was closed and the appeal had been taken.

STATEMENT.

Both the appellant, in supporting, and the respondent, in opposing the writ of certiorari, reviewed the history of the case in their briefs, and appellant has repeated the historical statement again at great length in its brief on pp. 3 to 7, inclusive.

It seems unnecessary, therefore, to review all of the details as to dates and rulings in this case again in this brief. It is sufficient to call attention to the fact that the Court below reversed the decision of the Commission refusing Paul R. Heitmeyer a construction permit for a new radio station at Cheyenne, Wyoming, on December 27, 1937. That was more than two years ago. Ever since that time, the Commission has avoided making a new decision on the record in accordance with the decision of the United States Court of Appeals for the District of Columbia.

For nearly a year and a half respondent has tried first by one legal method and then by another, to induce or compel the Commission to make a decision on the record on which appellants secured a reversal of the Commission's decision. The Commission was able to avoid making any such decision or even facing the issuance of a direct order of the Court below to take such action until May 24, 1939, when respondent secured the writ of mandamus directing the Commission so to do, whereupon the Commission, still unwilling to carry out the Court's order, secured a writ of certiorari from this Court.

Just why the Commission has so steadfastly resisted making a decision on this record has never been made plain. In its erroneous decision, as the Court below pointed out, it refused to grant Heitmeyer's application because he proposed to build and begin operating the station on borrowed money (R. 10-13.) This was arbitrary and capricious.

While the Commission set aside its arbitrary decision, it has never corrected that decision. During all these years the people of Cheyenne, the capital of Wyoming, have been without any primary radio service or even good secondary radio service.

ARGUMENTS OF APPELLANTS.

Counsel for the Commission have written a rather lengthy brief in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, No. 265, covering many of the questions presented by this case. They have adopted (p. 10 of appellants' Heitmeyer brief) the argument in that brief as a part of the brief in this case.

Counsel for the Commission try to make it appear that the variations of the facts in the Heitmeyer case are not material to the argument presented in No. 265. (See pp. 10 and 11 of appellant's brief).

We respectfully call the Court's attention to the fact that there are a number of distinct differences in the two cases:

1. In the Heitmeyer case, the respondent is required to have a hearing *de novo* and that hearing is to be a comparative hearing with two new applications that were filed after respondent took his appeal to the Court below. No new hearing or new record is required in the Pottsville case. Such a hearing would make the record of respondent upon which he secured a reversal of the Commission's decision worthless and useless in the new case. The Commission thereby would never be required to make a correct decision on the record upon which it made an erroneous decision.

2. In the Pottsville brief, appellants declare (p. 17), that the other applications involved were pending when it decided the Pottsville case. In the Heitmeyer case, the Commission had not only rendered its decision previous to the filing of the other two applications mentioned, but Heitmeyer's appeal had been taken and was pending. The reasons therein given by appellants for comparative consideration, therefore, do not apply in the Heitmeyer case.

3. Appellant's brief in the Pottsville case (p. 19), declares also that it might be necessary to grant one of the other applications and, because of such grant, be necessary to modify a license to the respondent. In the Heitmeyer case no such condition exists. Cheyenne, Wyoming is too small a town to support more than one station, so that if one applicant is granted a license, the Commission would have no reason for granting another application so long as the first licensee made a proper use of the facilities granted.

4. Appellants argue in the Pottsville brief (p. 9), that the Court below was interfering with the administrative procedure of the Commission when it ordered a decision on the record. They cite the amendment to the Federal Radio Act of 1927, which prohibited the Court from revising the Commission's decisions.

Neither the Court's decision nor its order granting a writ of mandamus in any way attempted to revise the

Commission's decision. The Court reversed the Commission's decision as arbitrary and capricious and remanded the case for further action, in accordance with that opinion. As stated in appellants' Heitmeyer brief (p. 3), the Court specifically declared:

> "This does not mean that it is directed to issue a permit to the appellant. * * * 'The Commission in its further action is to respect and follow the * * * determination of the questions of law' by this Court." (R. 13).

That is all the order granting the writ of mandamus directs the Commission to do.

As stated by respondent in his brief to the Court below (see p. 5 of brief of Paul R. Heitmeyer attached hereto as an appendix and made a part of this brief):

> "We call attention again to the fact that the law specifically and clearly states in Sec. 402 (e) that this Court's judgment shall be 'FINAL.'
>
> "Final for what? A further hearing? The creation of a **new** record with **new** issues requiring a **new** decision? Surely the Commission must make a legally correct 'decision' **once** on a case nearly **four years** old."

This case is now nearly five years old.

Quoting further from the Brief of Heitmeyer (p. 5), appended hereto:

> "In the case of *Morgan* v. *United States*, the Supreme Court said:
>
> 'The requirements of **fairness** are not exhausted in the taking or consideration of evidence, **but** extend to the **concluding** parts of the procedure **as well as** to the beginning and intermediate steps.' (Emphasis ours) 304 U. S. 1, 20."

5. Appellants argue in their brief (p. 9 of appellants' Brief in Heitmeyer case), as before the Court below, that the Court had no authority or occasion by writ of manda-

mus to compel the Commission to carry out its decision and order.

Appellants again present their claim that the decision of the Court below was *res adjudicata.*

As stated in the Heitmeyer brief of appellants, opposing granting writ of certiorari, the decision of the Court below has become final and the Court therefore has power to mandamus the Commission to carry out its orders (see p. 5 of Brief in Opposition to Petition for Writ of Certiorari with accompanying citations of supporting cases.)

In this connection we call attention to the opinion of the Court below (R. 53), to whom this same claim of **res adjudicata** was made. The Court, in explaining why it denied the motion for a rule to show cause, said:

> "We reversed that decision (the Heitmeyer decision) and remanded the case with instructions to proceed with the application in conformity with our opinion. Our judgment imposed on the Commission the duty of rehearing the case on the original record. Sanford Fork and Tool Co., Petitioner, 160 U. S. 247, 255. This is peculiarly true because of the fact that that record, as we have seen, was made upon full hearing of all the issues relative to the applicant's right to a permit; and **it was because we understood that the Commission would so proceed that we denied the rule to show cause.** It was not then brought to our attention—or, if it was, we overlooked it—that the Commission intended to impose upon appellee the making of an entirely new record, and to make the decision turn upon the relative merits of the qualifications of himself and two new parties who had become applicants for identical facilities since his case was first heard and decided and who, under the Commission's own rules, were not eligible to become parties to the record on appellee's application." (Emphasis ours).

6. Counsel for appellants have labored at great length in the Pottsville brief (pp. 37 to 46), to show that the Federal Communications Commission is not subject to the or-

ders of the Court below to carry out the terms of the decision as a judicial Court would do. In this they have completely failed.

The Federal Communications Commission is no different in character from the numerous other quasi-judicial bodies called commissions, which the Congress has constituted. For nearly 50 years, the Interstate Commerce Commission has accepted the reversals of its decisions and carried out the orders of the courts that have overruled them. No commission, so far as counsel for respondent has been able to learn, has ever before attempted to set itself up as above and beyond the rule of the courts as to the right of an applicant for a governmental privilege to have a decision on the record made before the quasi-judicial body empowered to grant such privilege.

The language of the appeal section of the Radio Communications Act of 1934 is almost identical with the language of the appeal sections of the acts of Congress creating and governing other commissions. It has remained for counsel for appellants to invent the novel theory that the Communications Commission is an administrative body to be excepted from the requirement of the general rule of law, set forth by this Court in *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255, and specifically relied upon by the Court below (R. 53):

In that case, the Supreme Court, by Mr. Justice Gray, said:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibald* v. *United States*,

37 U. S. 12 Pet. 488, 492, (9:1167, 1169); *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237.(37:717).

"If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v. *Fourniquet*, (55 U. S. 14 How. 313, 330) (14:435, 442). *Re Washington & G. R. Co.* 140 U. S. 91 (35:339); *City National Bank* v. *Hunter*, 152 U. S. 512 (38:534), 153 U. S. 246 (38:705). But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton*, 103 U. S. 764 (26:458); *Mason* v. *Pewabic Min. Co.* 153 U. S. 361 (38:754); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 5 U. S. App. 97, 51 Fed. Rep. 929."

7. Appellants argue also that Heitmeyer would suffer no irreparable injury. As pointed out to the Court below (see p. 15 of Brief of Paul R. Heitmeyer, attached hereto as appendix and made a part of this brief), if he refused to appear and take part in the new hearing with two new applicants, he would be in default, and if he participated in the hearing, he must make a new record and this would necessarily destroy any further consideration of the record upon which he had appealed and won a reversal.

CONFUSING THE ISSUE.

In appellants' briefs, both in the Pottsville case, No. 265, and in the Heitmeyer case, No. 316, appellants have tried to confuse the simple, clear issue in these cases by repeating the statement again and again that what the Commission does in this case after setting aside its erroneous decision, is entirely procedural and beyond control of the Court.

The issue is this: Has an applicant for a radio station the right to have his application decided by the Federal Communications Commission on the record made in a full and complete hearing, after the United States Court of Appeals for the District of Columbia has reversed the Commission's erroneous decision?

or

Must such an applicant submit to a comparative hearing *de novo* with two other applicants, new and strange to the record, and thereby never secure a corrected decision on the record he made and upon which he appealed and won a reversal?

ARGUMENT.

Counsel for the appellant Commission argue at great length that the Court below has attempted to interfere with the procedural duties of the Commission. Using that conclusion as a basis, they would have this Court justify all the erroneous orders of the Commission in this case. They try to make it appear that the Court below is entirely without authority to enforce its own orders because, as they say, the Court's order is an interference with the procedural rights and duties of the Commission.

APPELLANTS' MISTAKEN PREMISE.

Almost the entire argument of the appellants, as set forth in both the Pottsville and Heitmeyer briefs, is based upon the premise that the Commission **must grant a license to the applicant who will best serve the city or community for which new facilities are to be granted,** regardless of existing grants or licenses. They specifically make that statement in their brief in the *Pottsville* case (Page 39) as follows:

> "The Commission must obey the statutory command that the application which **best** serves the public interest be granted." (Emphasis ours.)

There is no such statutory command. The statute, Sec. 309 (a) provides:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding."

Of course, the same requirement, namely, "that public interest, convenience or necessity will be served by the granting thereof", applies to the Commission in granting a license after a hearing exactly as without a hearing. But there is no language in the statute, which even by inference, can be cited to support the claim of counsel for the appellant Commission, that after granting one license, if some other applicant comes along and promises to render better service, the Commission **must** modify or even refuse to renew the license of the existing licensee.

Nor is there a direction by any Court decision to that effect. In fact, the Commission itself, as well as the Court, have decided repeatedly that where an applicant has been granted a station license and is making proper use of the facilities, the Commission will not refuse to renew the application of the existing station, even though some other applicant might promise to make a better use of the said facilities.

From the decisions on this subject and the general rule of equity as applied to rights of radio licensees, it is clear that a court of equity would not permit the Commission to take such action.

The Court of Appeals first promulgated that idea in *Federal Laboratories v. Federal Radio Commission*, 36 F. (2d) 111, in 1929. The Court there referred to the right of renewal as a "continuing right." The Court declared that the applicant in that case was securing not only a new li-

cense, but also the right to a renewal license if it had made proper use of the facilities granted.

Again, in the case of *Chicago Federation of Labor* v. *Federal Radio Commission*, 41 F. (2d) 422, decided in 1930, the Court of Appeals sustained the Radio Commission's decision in favor of the renewal rights of the licensee's using the facilities for which WCFL applied.

In that case, the Court said:

> "The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced if the licenses of established stations should arbitrarily be withdrawn from them and appropriated to the use of other stations."

Acting on this suggestion by the Court, the Commission has never granted the facilities of one licensee to a new applicant simply because he promised to render a better service than the existing licensee. The Commission has consistently decided that if the existing licensee is making a proper use of the facilities, its license should be renewed.

Counsel for the Commission cite the decision in the *WIBO* case, *Radio Commission* v. *Nelson Bros.*, 289 U. S. 266, to support their conclusion that the Commission **must** grant a license to the applicant who will **best** serve the area under consideration, regardless of the rights of existing licensees. This is an entirely wrong interpretation and use of that decision.

What this Court really decided in that case was that as between contesting applicants, when the Commission was carrying out the direction of Congress in a regulatory manner, the right of the existing station to a renewal of license was not such as to stand against the exercise of the Commission's duty as directed by Congress.

At no time has the Court of Appeals of the District of Columbia or this Court ever decided that an existing licensee's license **must** be modified or its renewal **must** be denied simply because another applicant might promise to render better service, if granted such facilities.

GRANT OF POWER NOT MANDATORY DUTY.

It is true, as counsel for appellant argue, that the law gives the Commission the power to modify an existing license or to refuse its renewal, but this cannot be done without giving the existing licensee a hearing. (See *Salzman* v. *Stromberg Carlson Co.*, 46 F. (2d) 612.) That is a far different state of affairs from the claim which counsel for the appellant Commission makes in the *Pottsville* and *Heitmeyer* cases now for the first time, namely, that this right of the Commission must be considered a mandatory duty.

In the instant case, the Court of Appeals does not attempt to interfere with the procedure of the Commission. Having reversed the Commission, it has simply ordered that body to proceed to correct its decision and base that decision on the record which it used when it made its first erroneous decision.

What has the Commission done? It has insisted upon a hearing *de novo* with two new applicants, applicants who did not file their application until long after the record in this case had been closed. Appellants repeatedly assert in their briefs that the changed conditions make further hearings necessary.

As stated in Heitmeyer's brief to the Court below (see P. 6, Heitmeyer's Brief, appended hereto as a part of this brief):

> "If the present record as now constituted in good faith at *great* expense is not sufficient or satisfactory, why does not the Commission enter a decision to that effect, clearly appealable under the law? It may grant or deny the application, but it must make a decision. Can the Commission avoid the entry of an appealable order by mere procedural maneuvers *without* giving some reason for their action? Can they circumvent, set aside, and negate a final judgment of an appellate tribunal by the mere maneuver of a 'further hearing,' requiring the formation of a *different* record with *new* parties and *new* issues at *great* expense without mak

ing some findings as a basis for their action? Can the Commission make a 'racket' of one's cherished American right of having a hearing, by hearing his application to death before deciding the issues? Is that the purpose of the right of appeal? Can the Commission flaunt justice in this way? Does the fact that it is a *public* agency paid with *public* funds to perform a *public* duty give it a right to disregard the simplest principle of justice, and then defend that act by referring to the 'public interest' clause of the statute? Not according to the law as stated in Morgan v. United States, cited *infra.*"

It may be added that the granting of a construction permit for a new station does not necessarily require the granting of a station license. If the Commission should find the applicant's qualifications were such as not to justify the granting of the station license when the time for acting on that application arrives it can refuse such grant at that time.

RESULT OF COMMISSION'S PLAN OF PROCEDURE.

For the respondent Heitmeyer to enter upon such a hearing would mean that he must give up his right to have a correct decision as of the date when the Commission made its erroneous and arbitrary decision which the Court reversed. It would mean, too, that he must give up that right through no fault of his own, but solely because of the Commission's erroneous and arbitrary decision.

Worse than all that, if the Court should permit the Commission to carry out its orders in this case, it would mean the establishment of an entirely new rule of procedure for quasi-judicial commissions. It would practically destroy the right of applicants ever to secure a final decision in cases where the Commission continued to make erroneous decisions.

Under such procedure, there can be no finality. Every time the Commission makes an erroneous decision and an applicant appeals and the Court reverses the Commission's

decision, all new applicants who may have filed applications during the period of the appeal would be entitled to force the Commission to set down all of the pending applications for a new hearing on a comparative basis.

If such procedure be permitted to the Federal Communications Commission, it would apply also to such governmental bodies as the Federal Power Commission in granting licenses for the development of water power sites and to the Interstate Commerce Commission in granting certificates of convenience and necessity. This would be bureaucracy and administrative red tape run wild.

CLARENCE C. DILL,
JAMES W. GUM,
Counsel for Paul R. Heitmeyer.

January, 1940.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1939.

J. Lawrence Fly, et al., Petitioners,
vs.
Paul R. Heitmeyer.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

On March 25, 1935, Heitmeyer, respondent here, applied for a permit from the Federal Communications Commission under § 319 of the Communications Act of 1934, c. 652, 48 Stat. 1089, 47 U. S. C. 319, to construct a broadcasting station at Cheyenne, Wyoming. His application and a competing one were heard by an examiner. The Commission, on May 1, 1936, denied respondent's application on the sole ground that he was financially disqualified. He appealed to the United States Court of Appeals for the District of Columbia and the Commission's decision was reversed. *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91. To proceed in conformity with this opinion, the case was remanded to the Commission.

After Heitmeyer's appeal two other applications for the same facilities were filed with the Commission. Following intermediate litigation, needless here to recount, the Commission directed that respondent's case be reopened in conjunction with the pending rival applications. Before this hearing could be had, respondent obtained from the Court of Appeals a writ of mandamus directing the Commission to restrict consideration of his application to the record originally before it. *McNinch* v. *Heitmeyer*, 105 F. (2d) 41. Because important questions of administrative law were involved, we granted certiorari. 308 U. S. —.

This case is controlled by our decision in No. 265, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, decided this day.

The only relevant difference between the two cases is that h
the Commission proposed on remand not only to reconsider r
spondent's application on oral argument with subsequently fi
rival applications, but to reopen the record and take new evidenc
on the comparative ability of the various applicants to satisfy "pu
lic convenience, interest, or necessity." But the Commission's du
was to apply the statutory standard in deciding which of the ap
plicants was to receive a permit after it fell into legal error as wel
as before. If, in the Commission's judgment, new evidence wa
necessary to discharge its duty, the fact of a previously erroneou
denial should not, according to the principles enunciated in th
Pottsville case, *ante*, bar it from access to the necessary evidenc
for correct judgment.

The judgment is reversed, with directions to dissolve the writ o
mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.